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**Segmentation and Side Letters: New Zealand's Experience with ISDS in
the CPTPP**

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Abstract

Following the United States withdrawal from the Trans-Pacific Partnership (TPP) in 2017, the remaining states agreed to suspend a number of provisions and conclude the agreement between themselves. The new agreement was renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and was signed in March 2018. One of the most controversial aspects of the agreement is the investor-state dispute settlement mechanism (ISDS), which allows investors to bring arbitration claims against contracting states. At the time the agreement was signed, New Zealand agreed to five bilateral 'side-letters' with certain member states agreeing to limit the application of the ISDS clause.

This paper explores New Zealand's shift from a bilateral approach to international investment agreements to a multilateral approach, then back to a form of bilateralism within the multilateral CPTPP. The side letters can be characterised as subsequent agreements which modify a multilateral agreement between some of the parties, under art 41 of the Vienna Convention on the Law of Treaties. While this paper concludes that the mechanism is legally valid, the practical effectiveness is undermined by New Zealand's overlapping previous agreements, the possibility of treaty shopping and the prospects of further countries acceding to the CPTPP.

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Table of Contents

I	INTRODUCTION.....	4
II	MULTILATERALISM AND INVESTOR-STATE ARBITRATION.....	8
A	The failure of multilateralism	9
B	New Zealand’s investment agreements.....	14
III	SIDE LETTERS AS A TREATY MECHANISM.....	17
A	What are side letters?	19
B	Are side letters treaties?	24
C	What is the relationship of the ISDS side letters to the CPTPP?	27
1	Instrument related to the treaty	28
2	Reservations.....	29
3	Successive treaties	30
4	Inter se modification.....	30
5	Inter se suspension.....	31
D	Are the ISDS side letters valid under the Vienna Convention?	32
1	Express treaty provisions.....	34
2	Object and purpose	36
E	What happens if the ISDS side letters are not valid?	39
IV	EFFECTIVENESS OF NEW ZEALAND’S SIDE LETTERS	40
A	Are investors constrained within national boundaries?.....	41
B	How does the CPTPP interact with New Zealand’s previous IIAs?	46
1	Prioritization of the CPTPP	46
2	Prioritization of side letters.....	49
C	What is the impact of further accession?	52
V	CONCLUSION.....	53

I Introduction

Since the end of the Second World War, the international community has repeatedly tried and failed to establish a multilateral agreement governing the protection of international investment. To a large extent, this has been due to a lack of consensus between developed and developing countries over what rights should be afforded to foreign investors. Instead, countries have tended to conclude investment agreements bilaterally. As of 2018, there are now more than 2,300 bilateral investment treaties (BITs) in force throughout the world.¹ Following this international trend, New Zealand began signing bilateral investment agreements throughout the 1990s and 2000s.

Nevertheless, the pursuit of multilateral agreement has continued. The signing of the Trans-Pacific Partnership (TPP) in 2016 was a major step forward in multilateralism.² The mega-regional trade agreement was signed by twelve countries, varying greatly in economic size, region, population and development. New Zealand was one of the founding members of the agreement which started as the Trans-Pacific Strategic Economic Partnership Agreement with Singapore, Brunei and Chile.³ Among many areas, the TPP included a comprehensive chapter on investments. This chapter proved to be among the most controversial parts of the agreement, due to the provisions for investor-state dispute settlement (ISDS). These provisions are now standard in international investment agreements (IIAs). Where it is alleged a member state has breached an investment protection, the provisions allow the investor to submit the dispute to an international tribunal for arbitration. ISDS clauses are designed to increase certainty and provide an attractive climate to encourage investment. They have, however, been criticized for being non-transparent and affecting the state's ability to regulate in the public interest.

¹ UNCTAD Investment Policy Hub <investmentpolicyhub.unctad.org/IIA>.

² Trans-Pacific Partnership Agreement (signed 4 February 2016, did not enter into force) [TPP].

³ Trans-Pacific Strategic Economic Partnership [2006] NZTS 3 (signed 18 July 2005, entered into force 28 May 2006).

Following the United States withdrawal from the TPP in 2017, the agreement was renegotiated and signed by the remaining eleven member states. The agreement was renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, referred to as CPTPP or TPP-11.⁴ During this period, New Zealand also elected a new government. The new government was critical of ISDS and prioritized the issue during renegotiation.⁵ The focus of this paper is the compromise embarked upon by New Zealand in relation to ISDS in the renegotiated CPTPP through the use of ‘side letters’.

The CPTPP was signed on 8 March 2018 and will enter into force once half the member states have ratified it. Without the United States, the remaining members are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.⁶ The new treaty agrees to adopt the text of the TPP, but suspends certain provisions. Within the investment chapter, the new agreement suspends the ability to bring ISDS claims on the basis of government investment contracts and investment authorisation.⁷ Separate from the multilateral treaty, New Zealand signed various bilateral agreements with certain member states modifying parts of the main treaty. These ancillary agreements have been referred to as ‘side letters’. Side letters were signed by all the state parties, spanning various topics within the broad agreement. The interest of this paper is the use of the side letter mechanism to modify ISDS within the CPTPP. New Zealand signed separate side letters with Australia, Peru, Singapore, Malaysia and Brunei removing recourse to compulsory ISDS.⁸ The effect of these side letters is that individual investors from these countries are not entitled to bring investment dispute claims against New Zealand. Instead, they would need to rely on the state-to-state mechanism or pursue their

⁴ Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, not yet in force) [CPTPP].

⁵ Vernon Small “Jacinda Ardern seeking TPP concessions at first appearance on international stage” *Stuff.co.nz* (online ed, 6 November 2017).

⁶ New Zealand Foreign Affairs and Trade “Comprehensive and Progressive Agreement for Trans-Pacific Partnership” <www.mfat.govt.nz>.

⁷ Ministry of Foreign Affairs and Trade *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis* (March 2018) [CPTPP National Interest Analysis] at 40.

⁸ David Parker “New Zealand signs side letters curbing investor state dispute settlement” (press release, 9 March 2018).

claim through domestic courts. The side letters also apply vice versa, New Zealand investors cannot bring an ISDS claim against those countries. In relation to the other five member states, recourse to ISDS remains unmodified.

The ‘side letter’ approach to ISDS warrants deeper analysis for a number of reasons. This paper will trace the thematic shift from bilateralism to multilateralism, to a form of bilateralism within the multilateral approach evidenced by the ISDS side letters. On one hand, the use of widespread bilateral carve outs could be seen to undermine the object of having multilateral consensus. On the other hand, the added flexibility provided by such mechanisms can be constructive in getting parties with different interests to reach a multilateral agreement. While useful in reaching short term aims, the proliferation of the technique could have consequences for the coherence of the multilateral instrument. This approach to multilateral treaty making has received little attention or discussion. This paper seeks to shed light on the legal nature and effect of bilateral ‘side letter’ carve outs. The successful ratification of the CPTPP would be a major landmark in the field of international investment law. In the context of rising skepticism of investor-state arbitration, the ability for states to use side letters to modify and reform ISDS may be seen as a useful apparatus.

In Part II this paper looks at the history of unsuccessful multilateral investment instruments. Paradoxically, the repeated failure of a multilateral agreements has been accompanied by a proliferation of bilateral agreements which contain the same substantive protections. The CPTPP shares similarities with previous regional investment agreements such the North America Free Trade Agreement (NAFTA) Chapter 11 and the Energy Charter Treaty (ECT). This paper argues the CPTPP represents a step towards a truly multilateral instrument for international investment. Particularly given the diversity of its member states in development, geographic area and the common aspiration for further accession. This paper then provides background to New Zealand’s approach to ISDS specifically. Starting in the late 1990s, New Zealand began signing bilateral investment agreements with optional ISDS clauses. Over time this has shifted to participating in multilateral agreements with compulsory ISDS. Part II concludes by examining the current New Zealand government’s policy towards ISDS.

As mentioned, the general shift towards multilateralism is tempered by New Zealand's simultaneous retreat to a form of bilateralism by way of side letters. In Part III this paper considers the legal nature of the side letter mechanism. There has been little analysis generally about how such ancillary agreements interact with the main treaty and the theoretical limits of their application. An important initial question is, does this mechanism work? New Zealand and Australia agreed to remove recourse to investment arbitration in the 2009 Australia-ASEAN-New Zealand Free Trade Agreement (AANZFTA).⁹ Aside from this there appears to be no other precedent for bilaterally removing recourse to ISDS within a multilateral agreement by side letter. The validity of the side letter mechanism under art 41 of the Vienna Convention on the Law of Treaties principally depends on whether the multilateral investment protection can be considered 'absolute' obligations (applying communally between all the parties) or merely 'reciprocal' obligations (creating a web of bilateral obligations which can be individually varied). This paper argues multilateral trade agreements like the CPTPP create reciprocal obligations between all the parties and can therefore validly be modified by side letters.

Part IV considers the practical effectiveness of New Zealand's side letters excluding compulsory ISDS. The side letter compromise appears to overestimate the extent to which investors are constrained in a bilateral fashion. This paper examines critically the effectiveness of the 'denial of benefits' clause within the CPTPP, which is designed to prevent so-called 'treaty shopping'. New Zealand's compromise of accepting different levels of investment protection on a bilateral basis may be undermined if investors from one member state can structure their legal claim so as to benefit from the protections afforded to another state. Secondly, the paper argues that the side letters make little tangible difference to New Zealand's position. This is due to the interplay with previous agreements that contain uncircumscribed recourse to ISDS. Despite the renegotiation of the CPTPP,

⁹ Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Australia on the Application of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area to the Australia-New Zealand Closer Economic Relations Trade Agreement and associated instruments (signed 27 February 2009, entered into force 1 January 2010).

the scope of New Zealand's ISDS liability remains essentially the same as it would have been under the original TPP. Finally, this paper argues that the scope of New Zealand's ISDS liability will continue to expand because the CPTPP expressly contemplates accession by countries in the future. This paper argues that negotiating similar bilateral carve-outs of ISDS with all future signatories is unlikely.

II Multilateralism and investor-state arbitration

In the field of treaty making, the term 'bilateral' describes a treaty between two states, whereas 'multilateral' refers to a treaty between three or more states.¹⁰ The rules for making and applying bilateral and multilateral treaties are generally the same, although some provisions of the Vienna Convention on the Law of Treaties only apply to multilateral treaties.¹¹ However international relations scholars have contended this nominal definition of multilateralism "misses the *qualitative* dimension of the phenomenon that makes it distinct".¹² Ruggie describes 'multilateralism' as characterised by indivisibility, generalised principles of conduct and "diffuse reciprocity".¹³ The purpose of a multilateral instrument is to level the playing field for all participants and provide harmonised rules to apply regardless of particularistic interests. Ruggie notes that "...bilateralism, in contrast, is premised on specific reciprocity, the simultaneous balancing of specific quids-pro-quos by each party with every other at all times".¹⁴

When scholars refer to the failure of a multilateral agreement on investments, they do so despite the existence of a number of regional investment agreements which meet the nominal definition of "a treaty with three or more parties", such as NAFTA and the ASEAN Comprehensive Investment Agreement.¹⁵ A truly multilateral instrument for international

¹⁰ Anthony Aust *Modern Treaty Law and Practice* (3rd ed, Cambridge University Press, 2013) at 9.

¹¹ For example arts 40, 41, 58 and 60.

¹² John Ruggie "Multilateralism: the Anatomy of an Institution" (1992) 46(3) *International Organization* 561 at 566.

¹³ At 571.

¹⁴ At 572.

¹⁵ For example see Stephan Schill *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) at 24: "the proliferation of ... regional instruments was caused by the failure of genuine multilateralism".

investment would be one that codifies the rules relating to the treatment of foreign direct investment generally. While such an instrument would not necessarily require universal membership, it would require the support of the world's major economies and not be localized to a single region. The rise of so called 'mega-regional' agreements like CPTPP and the Transatlantic Trade and Investment Partnership (TTIP) sit in a halfway point between the 'true multilateralism' and the current fragmented approach. Looking to the future, they may act as a stepping stone to a consolidated global framework or they may further entrench the current fragmentation into separate spheres of influence.¹⁶

A The failure of multilateralism

The highly fragmented development of international investment law can be contrasted with the genuinely multilateral approach that has been taken in other areas of international economic law, such as international trade law and international monetary law.¹⁷ The General Agreements of Tariffs and Trade (GATT) was created in 1947 to establish a multilateral framework to govern international trade and in 1995 was succeeded by the World Trade Organisation (WTO). This framework allows the global market to function by setting out the principles of non-discrimination and anti-protectionism, and by providing a forum for member states to address disputes. The International Monetary Fund (IMF) created a regime which attempts to stabilize exchange rates to achieve monetary stability as a basis for international financial transactions and capital markets.¹⁸ In both these areas, global frameworks are necessary because individual nations cannot set up rules and institutions necessary for global exchange.

Similar to trade and monetary law, foreign investment requires cooperation at the international level and a governing structure. Schill notes this is less to do with the flow of

¹⁶ World Economic Forum *Mega-regional Trade Agreements: Game Changers of Costly Distractions for the World Trading System?* (July 2014) at 22.

¹⁷ At 9.

¹⁸ John Jackson "Global Economics and International Economic Law" (1998) *J Int'l Econ L* 1 at 3.

investment across borders, but more because the host State itself is a relevant actor.¹⁹ Before an investment is made, the interests of the host state and the investor are aligned, both wanting to encourage the investment. However, once the investment is made, the investor is in a more vulnerable position and there is an incentive for the state to unilaterally change the terms of the investment. Once the investment has been made, the investor usually cannot withdraw the investment without suffering significant financial loss. Conversely, the host State can opportunistically amend the law relating to the investment or even expropriate the investment without compensating the investor. Regardless of whether or not these possibilities eventuate, political-risk of investment increases the cost for investors and consumers and may discourage foreign investment entirely. The function of an agreement to promote and protect investments is to change the calculus, to outweigh the incentives for the host State to act unfairly. The function of the ISDS mechanism is to provide a neutral forum, beyond the host state's own domestic courts, for investors to enforce these protections. The structure of the international economy has been described as an unbalanced and unstable two-legged stool, supported only by international trade (GATT) and monetary law (IMF), but missing a comprehensive instrument regulating foreign direct investment.²⁰ The lack of a multilateral investment agreement has been referred to as “a gaping hole in the current global economic architecture”.²¹

In the post-Second World War period, the Charter for an International Trade Organisation (ITO) was presented at a 1948 meeting to state parties in Havana.²² The ITO was designed to be the third pillar of the Bretton Woods which dealt compressively with issues of both trade and investment. Despite opposition from developing countries, the United States delegation succeeded in including provisions relating to foreign investment within the ITO Charter. However, the rights eventually granted to foreign investors were significantly

¹⁹ Stephan Schill *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) at 3.

²⁰ John Kline “International Regulation of Transnational Business” (1993) 2 *Transnat'l Corp* 153 at 154.

²¹ Anders Åslund *The World Needs a Multilateral Investment Agreement* (Peterson Institute for International Economic, PB13-01, January 2013) at 1.

²² Jürgen Kurtz “A General Investment Agreement in the WTO: Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment” (2002) 23 *U Pa J Int'l Econ L* 713 at 718.

diluted down from earlier proposals.²³ The Havana Charter only set out a symbolic undertaking that parties “provide reasonable opportunities for investment acceptable to them and adequate security for existing and future investments” and “give due regard to the desirability of avoiding discrimination as between foreign investments”.²⁴

There was significant resistance from developing countries to any proposal to include substantive obligations for the protection of foreign investments.²⁵ The interest of developing countries was also reflected in the provisions which stated that host States had a right to “take any appropriate safeguards necessary” to prevent foreign investments from being used as a basis for “interference in its internal affairs and national policy”.²⁶ Even the restricted investment protections in the ITO never came into effect because the Charter establishing the organization ultimately failed. President Truman never submitted the Charter to the United States Senate for ratification as it was opposed by the United States business community.²⁷

In 1967 the OECD proposed a Draft Convention on the Protection of Foreign Property which contained most of the protections of a modern BIT, including an ISDS clause. It failed to gain sufficient support from OECD members and never opened for signatures. Similar to the ITO Charter, it failed due to the disagreement between developed and developing countries about the appropriate level of protection for foreign investments under international law.²⁸ This Draft Convention was however used as a model for many BITs that were later concluded with developing countries, which explains the large degree homogeneity between modern BITs.²⁹

²³ At 719.

²⁴ At 719.

²⁵ Schill, above n 19, at 33.

²⁶ Congyan Cai “Trans-Pacific Partnership and the Multilateralization of International Investment Law” (2013) 6 *J E Asia & Int’l L* 385 at 394.

²⁷ At 394.

²⁸ At 36.

²⁹ At 40.

A comprehensive investment regimes has been pushed for on a number of occasions in the GATT and WTO negotiations. The GATT Uruguay Round resulted in a much watered down and limited agreement on Trade-Related Investment Measures (TRIMs).³⁰ However no progress has been made since, largely due to the difficulty of reaching consensus between so many diverse member states. In August 2004 the WTO General Council ultimately decided that all investment issues would be excluded from the Doha Round.³¹

The most ambitious attempt to establish a multilateral investment instrument was initiated by the OECD in the mid-1990s, with the proposed Multilateral Agreement on Investment (MAI).³² The members appreciated that the WTO would not be a suitable forum to negotiate because so many of the members were developing countries.³³ Instead the developed member states of the OECD intended to hold closed negotiations but have the MAI open to non-OECD member states to sign. The MAI included a broad definition of investment, protected against direct and indirect expropriation and had an ISDS clause. Similar to previous attempts at a multilateral investment agreement, the MAI failed for a number of reasons both 'internal' and 'external'. There remained substantive differences between the negotiating parties but there was also effective opposition by a coalition of NGOs and civil society.³⁴ The negotiations officially ended when France withdrew from the negotiations, followed by UK, Germany and Canada.³⁵

Notwithstanding their rejection of multilateral investment agreements, developing states have increasingly concluded bilateral agreements which contain the same substantive obligations as the rejected agreements. Schill suggests two explanations for this seemingly contradictory development: states get benefits from a bilateral context that they do not receive in a multilateral context, or states are able to combine their negotiating strength to

³⁰ Kurtz, above n 22, at 888.

³¹ Cai, above n 26, at 396.

³² At 396.

³³ At 396.

³⁴ Edward Graham *Fighting the Wrong Enemy: Anti-global Activists and Multinational Enterprises* (Institute for International Economics, Washington DC, 2000) at 35.

³⁵ At 10.

reject proposals in a multilateral setting that they lack the leverage to do so in a bilateral exchange.³⁶ Both of these explanations suggest that international investment relationships depend to a large extent on quid pro quo bargains between states.³⁷

The CPTPP looks set to achieve what the MAI failed to do: begin life as a large regional investment agreement and potentially evolve into a multilateral or quasi-multilateral institution. The CPTPP is seen as the most credible pathway to reach a Free Trade Area of the Asia Pacific, a primary goal of regional integration at the 2010 APEC Summit.³⁸ APEC members account for 44 percent of the world population and 53 percent of the world GDP.³⁹ The potential impact of the CPTPP regime could therefore be greatly significant. The CPTPP differs from previous regional FTAs including investment protections, such as NAFTA, due to its expressly expansionist ambition. The preamble to the TPP expressly resolves to “expand their partnership by encouraging the accession of other States... and create the foundation of a Free Trade Area of the Asia Pacific”.⁴⁰

It is central to the success of the CPTPP that it is not merely an investment agreement. The Investment Chapter sits alongside 27 other chapters spanning areas such as technical barriers to trade, government procurement and labour standards. Why the CPTPP succeeded where the MAI failed is that investment negotiations were integrated into a broader bargain. The quid pro quo of negotiations was not just within the investment chapter itself, but rather states balanced concessions on investment generally in order to benefit from greater market access. While smaller, capital importing states like New Zealand may not view robust investor protection as a priority, it is an acceptable trade-off for preferential access to economies like Canada and Japan.

³⁶ Schill, above n 19, at 23.

³⁷ Schill, above n 19, at 24.

³⁸ APEC “Pathways to FTAAP” (joint statement, 14 November 2010).

³⁹ See “Achievements and Benefits” APEC <www.apec.org>.

⁴⁰ TPP, preamble.

B New Zealand's investment agreements

The ISDS provisions in the CPTPP was met with significant public outcry, however New Zealand has previously entered into multiple international investment agreements with ISDS clauses with comparatively little controversy.⁴¹ New Zealand has entered fewer IIAs relative to Australia, however, which has agreements with around 30 countries. As a small economy, New Zealand has historically favoured pursuing international relations through multilateral institutions such as the UN and the WTO given their scope for wide application. It is also more efficient for New Zealand trade negotiators to dedicate its limited resources to a large grouping of countries, rather than a series of countries individually. New Zealand only embarked on concluding bilateral IIAs when it became clear that no further investment liberalisation was likely to come from multilateral institutions such as the WTO and the OECD.⁴² However New Zealand's subsequent involvement in agreements with the ASEAN-block and the CPTPP can be viewed as a return to its preferred approach of multilateralism.

New Zealand's first BIT was signed in 1995 with Hong Kong.⁴³ The agreement provides for ISDS under art 9 and continues in force today. The vague wording of older agreements such as the Hong Kong BIT have proven advantageous to investors as there is more scope for arbitrators to interpret provisions in investors' favour. As demonstrated by the CPTPP, modern IIAs now usually adopt more precise wording in order to limit the possible interpretation of the treaty.

Aside from Hong Kong, New Zealand's first FTAs and BITs limited ISDS to situations where the host state had given specific consent to the claim. New Zealand signed BITs with

⁴¹ Amokura Kawharu and Luke Nottage *Renouncing Investor-State Dispute Settlement in Australia, then New Zealand: Déjà vu* (University of Sydney Law School, Legal Studies Research Paper Series No 18/03, 2018) at 3.

⁴² Amokura Kawharu "Process, Politics and the Politics of Process: The Trans-Pacific Partnership in New Zealand" (2016) 17 MJIL 286 at 288.

⁴³ Agreement between the Government of New Zealand and the Government of Hong Kong for the Promotion and Protection of Investments [1995] NZTS 14 (signed 6 July 1995, entered into force 5 August 1995).

Chile and Argentina in 1999 that contained conditional ISDS clauses. In the Argentina BIT it stated "...in the case of international arbitration, unless the parties to the dispute agree otherwise, the dispute shall be submitted to either [ICSID or UNCITRAL]", it further stated "Paragraph (3) of this Article shall not constitute, by itself, the consent of the Contracting Party [under the ICSID Convention]".⁴⁴ The South American BITs were never ratified however, the reasons for this are unclear. Nottage suggests the Clark Labour Government may not have pressed for ratification of an agreement containing ISDS. This may have been linked to New Zealand's developing opposition to the MAI in 1998.⁴⁵

New Zealand continued to enter into BITs throughout the early 2000s with conditional ISDS clauses. This was in contrast to Australia which had entered into FTAs with full advanced consent to investment arbitration. New Zealand entered into an FTA with Singapore in 2001 which contained an investment chapter, but limited access to ISDS by allowing the host states to withhold consent in the event of a claim.⁴⁶ Similarly, the FTA with Thailand which entered into force in 2005 contained a conditional ISDS clause.⁴⁷

New Zealand's first foray into compulsory ISDS within an investment chapter was the FTA signed with China in 2008.⁴⁸ This was a comprehensive agreement which provided the parties' advance consent for an arbitration claim for expropriation and other protections, such as a fair and equitable treatment. The agreement had bipartisan support in the New Zealand Parliament and the issue of ISDS did not receive prominent attention at the time.⁴⁹ The same was true for New Zealand's entry into the Australia-ASEAN-New Zealand Free

⁴⁴ Agreement between the Government of New Zealand and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments (signed 27 August 1999, did not enter into force), art 12.

⁴⁵ Luke Nottage "Investment Treaty Arbitration Policy in Australia, New Zealand and Korea" (2015) 25 J Arb Stud 185 at 210.

⁴⁶ Agreement between New Zealand and Singapore on a Closer Economic Partnership [2001] NZTS 1 (signed 14 November 2000, entered into force 1 January 2001), art 34.

⁴⁷ New Zealand – Thailand Closer Economic Partnership Agreement [2005] NZTS 8 (signed 19 April 2005, entered into force 1 July 2005), art 9.16.

⁴⁸ Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China [2008] NZTS 19 (signed 7 April 2008, entered into force 1 October 2008).

⁴⁹ Kawharu, above 42, at 288.

Trade Agreement (AANZFTA). In the National Interest Analysis accompanying AANZFTA there was little discussion about the impact of the ISDS clause.⁵⁰

New Zealand has never been subject to an investor-state arbitration claim, nor have any outbound New Zealand investors utilized ISDS against another state.⁵¹ Nevertheless, the once obscure treaty provisions began to galvanize public opposition in the wake of several highly publicized arbitration claims. One high profile case that informed public opinion was commenced by Phillip Morris Asia Ltd against Australia over plain packaging laws for cigarettes.⁵²

This scope of this paper is insufficient to make a normative assessment on the value of ISDS generally. The common objection to ISDS clauses is that they restrict a state's ability to regulate in the public interest. Even where such regulation would not give rise to a successful ISDS claim, there is concern over the potential "chilling effect" that the possibility may give rise to.⁵³ The new government raised specific objections to foreign companies being granted more rights for enforcement than domestic companies.⁵⁴ Finally there have been general objections to the lack of transparency in investment arbitral tribunals and the absence of an effective appeals mechanism.⁵⁵

In one of the first post-Cabinet press conferences following the election, Prime Minister Jacinda Ardern outlined New Zealand's official opposition to ISDS clauses and that "we remain determined to do our utmost to amend the ISDS provisions of TPP".⁵⁶ Trade

⁵⁰ Ministry of Foreign Affairs and Trade *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area: National Interest Analysis* (December 2015) at 38.

⁵¹ David Parker "Opening of Apec Business Advisory Council, Auckland New Zealand" (speech, 2 February 2018).

⁵² Daniel Hurst "Australia wins international legal battle with Phillip Morris over plain packaging" *The Guardian* (online ed, 18 December 2015).

⁵³ See Matthew Rimmer "The Chilling Effect: Investor-State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products, and the Trans-Pacific Partnership" (2017) 7 *Victoria U L & Just J* 76.

⁵⁴ Vernon Small "Labour sets 'non-negotiable' stance on TPP free trade talks" *Stuff* (online ed, 23 July 2015).

⁵⁵ See Stuart Boyarsky "Transparency in Investor-State Arbitration" (2015) 21 *Disp Resol Mag* 34.

⁵⁶ Jacinda Ardern "Foreign speculators house ban" (press release, 31 October 2009).

negotiators were also instructed to oppose ISDS in any future free trade agreement. In New Zealand’s revised negotiating mandate, negotiators sought to make ISDS a voluntary mechanism for New Zealand, although it was noted “this would be very difficult to achieve”.⁵⁷ The difficulty in renegotiating ISDS was the “explicit opposition” of an unnamed state, because ISDS was a “commercial priority for them”.⁵⁸ There was concern that “if we insist on a voluntary ISDS approach, other partners will move on with the Agreement without New Zealand’s participation”.⁵⁹

As predicted, the New Zealand negotiators were unable to get the other parties to agree to make ISDS voluntary within the CPTPP. Instead New Zealand negotiators sought to make changes with CPTPP member states on a bilateral basis through the mechanism of ‘side letters’. This approach will be explored in depth in Part III.

III Side letters as a treaty mechanism

New Zealand used the mechanism of ‘side letters’ to exclude the investor-state dispute settlement provisions in the CPTPP for investors from Australia and Peru.⁶⁰ Side letters with Malaysia, Brunei and Vietnam modify the dispute settlement provisions so that the New Zealand government would need to give consent to arbitration.⁶¹ Further side letters were also signed by other countries to conclude various bilateral agreements and

⁵⁷ Cabinet Office Circular “Revised Trans-Pacific Partnership: Negotiating Mandate” (31 October 2017) CAB-17-MIN-0488 at [11].

⁵⁸ At [26].

⁵⁹ At [29].

⁶⁰ Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Australia on ISDS, Trade Remedies and Relationship with Other Agreements (signed 8 March 2018, not yet in force), cl 4; Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Peru on ISDS (signed 8 March 2018, not yet in force), cl 2.

⁶¹ Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Malaysia on ISDS (signed 8 March 2018, not yet in force), cl 2(c); Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Brunei Darussalam on ISDS (signed 8 March 2018, not yet in force), cl 2(c); Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Vietnam on ISDS (signed 8 March 2018, not yet in force), cl 2(c).

understandings on issues within the CPTPP. Taking a step back though, what exactly is a ‘side letter’? The term does not appear within the documents themselves, but ‘side letter’ is the term which has been used in media reports and government publications to describe them.⁶²

References to side letters has appeared in a number of context, but the phrase itself has not been a widely used term of art in international law. For example, the term ‘side letter’ is not found in the Vienna Convention on the Law of Treaties, nor does it appear in any of the reports or commentaries of the International Law Commission. There is no reference to side letters in standard textbooks on treaty law such as Aust’s *Modern Treaty Law and Practice*.⁶³ The National Interest Analysis that accompanied the CPTPP described the contents of New Zealand’s side letters but made no attempt to explain their legal nature or the precedent for the approach.⁶⁴ There is also not uniformity regarding the use of the term, at times various other terms are used such as ‘side instruments’, ‘side agreements’, or simply ‘bilateral arrangements’.⁶⁵

Thus far, the precise legal nature of a ‘side letter’ does not appear to have caused any real consternation. The evidence of state practice demonstrates that side letters are undeniably a phenomenon that *exist*, but how do they fit into our current conception of international law? Concluding a side letter to a bilateral treaty is relatively uncontroversial because it is unambiguous that both state parties have expressed their consent to whatever arrangement is described. However, in the context of a bilateral side letter to a multilateral treaty, the question of legal character becomes more significant. In this situation, two state parties are purporting to vary or supplement an agreement that is made with other state parties. The

⁶² For example see Vernon Small “Jacinda Ardern seeking TPP concessions at first appearance on international stage” *Suff.co.nz* (online ed, 6 November 2017); Hon David Parker “New Zealand signs side letters curbing investor-state dispute settlement” (press release, 9 March 2018); Ministry of Foreign Affairs and Trade *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis* (March 2018) [CPTPP National Interest Analysis] at 121.

⁶³ Anthony Aust *Modern Treaty Law and Practice* (3rd ed, Cambridge University Press, 2013).

⁶⁴ CPTPP National Interest Analysis, above n 62.

⁶⁵ For example see Australia Government Department of Foreign Affairs and Trade “TPP-11 and associated documents” <dfat.gov.au/>.

situation is more complicated because there is potentially an issue of whether the other state parties have consented to the bilateral agreement.

This section will first discuss the use of side letters generally in international treaty making. It will then consider whether New Zealand's side letters relating to ISDS can be considered treaties under international law. If the side letters are treaties, how exactly do these bilateral treaties interact with the multilateral treaty to which they relate? This section will then consider whether the instruments themselves are legally valid and the implications if they are not.

A What are side letters?

The nature of side letters can be explained by reference to the term's component parts. 'Side' refers to the fact that the arrangement is not an isolated agreement, but instead it relates in some way to a broader agreement. 'Letters' refers to the mechanism by which the arrangements are made, that is by 'exchange of letters'. 'Exchange of letters' (or 'exchange of notes') is a diplomatic mechanism by which state parties can make an arrangement. This is usually constituted by one party sending a letter outlining the terms of the arrangement, while the other parties responds by quoting the contents of the first letter and expressing their consent.⁶⁶ For example, New Zealand's side letter with Peru is set out as a formal letter from New Zealand's Minister for Trade and Export Growth, David Parker, to Peru's Minister of Foreign Trade and Tourism, Eduardo Ferreyros Küppers:⁶⁷

8 March 2018

Eduardo Ferreyros Küppers
Minister of Foreign Trade and Tourism
Peru

Dear Minister,

⁶⁶ Aust, n 1, at 23.

⁶⁷ New Zealand-Peru side letter, above n 60.

In connection with the signing on this date of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (the “Agreement”). I have the honour to confirm the following agreement reached between the Government of Peru and the Government of New Zealand during the course of negotiations of the Agreement:

1. No investor of New Zealand shall have recourse to dispute settlement against the Government of Peru under Chapter 9, Section B (Investor-state Dispute Settlement) of the Agreement.

....

The state representatives of Peru returned a letter (in English and Spanish) quoting the contents of New Zealand’s letter and affirming its contents. This mechanism for making an arrangement can be contrasted with the more standard format, where an agreement is written on a single document and the various parties include their signature. An ‘exchange of letters’ can relate to any arrangement between two states, whether it is a stand-alone arrangement or associated with another broader agreement.

It is possible that the term side letters has been imported from the field of commercial law where it refers to a document which is ancillary to a contract, either clarifying, varying or supplementing the original contract.⁶⁸ Side letters, of this sort, are often used in property transactions because a lease or property interest may later be assigned, but the parties do not intend certain aspects of the contract to apply to successors.⁶⁹ The concept of a ‘side letter’, in this commercial sense, has received judicial discussion in cases such as *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] where the court considered the legal enforceability of such arrangements.⁷⁰

Despite the fact that references to side letters are usually found in discussions of commercial law, there is evidence of their use in treaty practice going back a number of

⁶⁸ Patricia Wade and Sarah Staffrod “Side letters: binding or not binding?” *Ashurst* (28 September 2011).

⁶⁹ Debbie Serota “Side letters – what are they and when are they suitable?” *Darlingtons* (19 March 2018).

⁷⁰ *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 at [109].

decades. A 1966 article refers to the use of a ‘side letter’ between the United States and Mexico to supplement the Mexico-United States Air Transport Agreement granting a flight route between Cozumel and Miami.⁷¹ In 1977 the United States and Japan signed a ‘side letter’ in relation to the Orderly Marketing Agreement that assured the Japanese Government that the United States would urge the International Trade Commission to terminate its investigation into the dumping of televisions.⁷²

In 2005, the Australian Department of Foreign Affairs published *Negotiating Free-Trade Agreements: A Guide* to a workshop at the Asia Pacific Economic Cooperation. The publication stated the following about the use of ‘side letters’:⁷³

Most free-trade agreements have attached to them an array of side letters and exchanges of letters... Side letters and exchanges of letters are used for a wide range of purposes. Sometimes they are used when they apply to a temporary situation. For example, a party may have undertaken to enact a law in a given area. In another case a party may explain to the other party of the intent of a domestic law and assure it that it can see no reason why it would be applied to the other party. In such cases an exchange of letters then confirms the understanding of the parties that this is the case. This obviates the need for a separate provision in the agreement which would soon be superseded or be of exceedingly minor importance.

The mechanism of side letters takes on different characteristics when applied to a multilateral agreement. In a bilateral agreement, a side letter may simply be a convenient way of tying up loose ends or clarifying parts of an agreement. No issue arises regarding the potential impact on third parties. In a multilateral agreement other parties may have a stake in what is agreed to by two parties within the agreement, especially when the purpose of the treaty is to harmonize laws within the grouping.

⁷¹ H Max Healey “Revisions to the Mexico-United States Air Transport Agreement” (1966) 32 J Air L & Com 167 at 184.

⁷² John Nevin “Enforcing the Antidumping Laws: The Television Dumping Case” (1979) 6 J Legis 24 at 27.

⁷³ Walter Goode *Negotiating free-trade agreements: A Guide* (Australia Department of Foreign Affairs and Trade, 2005) at 104.

This is not to say that multilateral agreements cannot contain provisions which only apply between specific member states. Indeed this is relatively common, especially in relation to trade agreement which may seek to provide different levels of market access to different state parties. These arrangements are not usually achieved by ‘side letter’ however, but rather included in the schedules and annexes of the agreement. For example, one appendix to NAFTA, which is between the United States, Mexico and Canada, states “Canada may adopt or maintain prohibitions or restrictions on imports of used vehicles from the territory of Mexico, except as follows... [list of criteria]”.⁷⁴ The difference between including a provision which applies bilaterally within an annex, as opposed to a ‘side letter’, is that ultimately all the parties sign on to the agreement as a whole (including the annexes). All parties therefore give their consent to the bilateral change to the status quo of the agreement.

Similarly, it is common for multilateral agreements to include carve outs that apply unilaterally for a particular member state. For example, one provision in the CPTPP which prohibits the resale of public telecommunications services has a special carve out for Brunei contained in a footnote: “Brunei Darussalam may require that licensees who purchase public telecommunications services on a wholesale basis only resell their services to an end-user”.⁷⁵ While this sort of carve-out may undermine the concept of reciprocity, it does not have bilateral implications because the provision applies equally to all member states in their relationship to that member. It is agreed to by all the member states of the multilateral agreement.

Concluding bilateral side letters to multilateral agreements is not unprecedented however. For example, the United States concluded a side letter with Mexico parallel to its signing of NAFTA modifying the provisions relating to the import of sugar. This side letter has

⁷⁴ NAFTA, annex 200-A.1 (4).

⁷⁵ CPTPP, Article 13.10 (footnote 12).

resulted in some controversy due to the fact that the wording of the reciprocal letters were different.⁷⁶

In the context of the CPTPP, New Zealand signed 25 side letters with the different member states spanning various topics.⁷⁷ To give an idea of the extent: Canada signed 39 side letters, Australia signed 21 and Vietnam signed at least 39. Some of the side letters were agreed to by all the parties, such as the side letter which permits Canada to require foreign companies to contribute to Canadian content development or restrict access to on-line foreign audio-visual content.⁷⁸ Others were agreed to between two member states on a reciprocal basis, as has been discussed. The approach of signing an identical side letter with every member state has an effect analogous to including a unilateral carve out within the agreement itself, albeit achieved in a much less straight forward manner.

The profusion of side letters that accompanied the CPTPP is likely due to the unique circumstances that surrounded its short period of negotiation. The text of the original TPP had been carefully negotiated over a period of seven years. Following the withdrawal of the United States, the desire to maintain the negotiated consensus had to be balanced against the shift in each member state's respective interest analysis. The use of side letters allowed states to make desired modifications while leaving the original negotiated text unchanged. Presumably this was desirable because it makes the possibility of a future re-entry by the United States into the agreement more straightforward. In the context of international investment law however, this appears to be the first instance of the 'side letter' mechanism being used to remove prior consent to investor arbitration, besides New Zealand and Australia's approach to AANZFTA.

⁷⁶ Gary Hufbauer and Jeffrey Schott *NAFTA Revisited: Achievements and Challenges* (Institute for International Economics, Washington DC, 2005) at 321.

⁷⁷ For a list of New Zealand's side letters see <<http://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/>>.

⁷⁸ CPTPP National Interest Analysis, above n 62, at 197. For example see Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Canada on Cultural Industries (signed 8 March 2018, not yet in force).

B Are side letters treaties?

It is not possible to state generally that side letters constitute treaties under international law because the determination will depend in every case on the particular wording of the instrument. But the fact that the side letters are constituted by an exchange of letters, rather than the traditional form of a treaty, is not an impediment to its characterization. In the initial drafting of the Vienna Convention on the Law of Treaties, the International Law Commission was divided on the legal character of such exchanges of notes and letters.⁷⁹ However the final Convention expressly envisages this form of agreement, it defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument *or in two or more related instruments* and whatever its particular designation” [emphasis added].⁸⁰ Nowadays, approximately a third of treaties registered with the United Nations each year take the form of an exchange of notes.⁸¹

Where an agreement takes the form of an exchange of notes it can either constitute a treaty between the states or simply a ‘memorandum of understanding’.⁸² A memorandum of understanding may express states’ intentions towards one another, but it is not governed by international law nor does it create binding obligations.⁸³ Memorandum of understanding are also variously referred to as ‘political agreements’, ‘de facto agreements’, ‘non-legal agreements’ or ‘gentleman’s agreement’.⁸⁴ When New Zealand granted an exemption to Singapore for its ban of overseas buyers purchasing residential homes, it has been reported New Zealand signed this sort of diplomatic side letter stating they could renegotiate if there was a significant increase of sales to Singaporean people.⁸⁵

⁷⁹ Malgosia Fitzmaurice “The Identification and Character of Treaties and Treaty Obligations between States in International Law” (2003) 73(1) BYIL 141 at 150.

⁸⁰ VCLT, art 2(1)(a).

⁸¹ Aust, above n 63, at 94.

⁸² At 23.

⁸³ At 30.

⁸⁴ At 28.

⁸⁵ Jane Patterson “Government relaxes rules on foreign buyer ban” *Radio New Zealand* (online ed, 19 June 2018).

Some of the 25 side letters signed by New Zealand in relation to the CPTPP express an intent to be legally bound and some do not.

For example, one of the side letters New Zealand signed with Chile relates to electronic payment services.⁸⁶ This side letter provides that Chile's current regulations regarding the supply of electronic payment services for payment card transactions complies with a certain annex of the CPTPP, therefore Chile does not need to modify any of its laws. This side letter does not create any legal obligations for either country, it simply affirms a certain interpretation of the main agreement. The letters each conclude with "I have the further honour to propose that this letter and your letter in reply *constitute an understanding* between our two Governments" [emphasis added]. This is an example of a side letter that does not constitute a treaty but could be used as an aid to interpretation if there was ever a dispute about Chile's compliance with the main agreement.

By contrast, each of New Zealand's side letters relating to ISDS make explicit their intention to constitute an agreement. The side letter with Malaysia, which makes ISDS dependent on the host state's consent, concludes by stating:⁸⁷

I have the honour to propose that this letter and your letter of confirmation in reply *shall constitute an agreement* between the Government of New Zealand and the Government of Malaysia which shall enter into force on the date of entry into force of the Agreement for both the Government of New Zealand and the Government of Malaysia. [Emphasis added].

The same wording of "constitute an agreement" is used in the other side letters relating to ISDS. This express wording aligns with the requirement for consent set out in art 13 of the Vienna Convention, that the instruments "provide that their exchange shall have that effect".⁸⁸ The result, therefore, is that each of these side letters are treaties under

⁸⁶ Exchange of Letters constituting an Understanding between the Government of New Zealand and the Government of Chile on Agricultural Chemical Test Data (signed 8 March 2018, not yet in effect).

⁸⁷ New Zealand-Malaysia side letter, above n 61.

⁸⁸ VCLT, art 13(1).

international law. This interpretation is in line with how the governments themselves view the obligations. The National Interest Analysis stated that “New Zealand has agreed a *treaty status*, legally binding side letter with Australia and Peru...”⁸⁹

Having established that (at least some of) New Zealand’s side letters set out treaty obligations, a question remains whether they are simply a constituent *part* of the treaty forming the CPTPP (analogous to annexes or appendices), or whether they are all *separate* treaties under international law. The practical significance of this distinction will be elaborated on in the following section. In the opinion of this paper, the later view should be preferred – each side letter constitutes a separate treaty.

The first difficulty with conceptualizing New Zealand’s side letters as part of the broader CPTPP agreement, is that it gives rise to a single agreement with diametrically opposed provisions. Chapter 9, Section B of the CPTPP expressly provides that investors of all member states have recourse to dispute settlement. On the other hand, the side letter with Australia provides “No investor of Australia shall have recourse to dispute settlement against New Zealand under Chapter 9, Section B”.⁹⁰ Ultimately this difficulty alone would probably not be insurmountable due to the interpretative principle of *lex specialis derogate prior* (a special rule prevails over a general rule).⁹¹

While somewhat inconsistent in this area, the New Zealand Treaty Database provides further support for the interpretation. New Zealand and Australia signed a similar side letter removing recourse to ISDS under AANZFTA in 2009.⁹² While listing that AANZFTA, is an “Associated Treaty”, the Exchange of Letters is listed as a separate treaty that is in force

⁸⁹ CPTPP National Interest Analysis, above n 62, at 121.

⁹⁰ Australia-NZ side letter, above n 60.

⁹¹ Marie-Pierre Lanfranchi “Article 58 Convention of 1969” in Oliver Corten and Pierre Klein (ed) *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, New York, 2011) 1311 at 1321.

⁹² Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Australia on the Application of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area to the Australia-New Zealand Closer Economic Relations Trade Agreement and associated instruments B2009/02 (signed 27 February 2009, entered into force 1 January 2010).

and has a separate treaty code (B2009/02). The CPTPP and its associated side letters have not yet been added to New Zealand's treaty database.

A further factor going against treating the side letters as being part of the agreement is the wording of the CPTPP itself. Article 30.1 in the Final Provisions Chapter states “[t]he Annexes, Appendices and footnotes to this Agreement shall constitute an integral part of this Agreement.” This passage does not make reference to ‘side letters, ‘side instruments’ or anything along these lines, nor is there reference anywhere else in the agreement. As noted earlier, the essential distinction between an appendix which contains bilateral carve outs compared to a side letter, is that the appendix is, at least in theory, agreed to by all parties to the treaty. The main reason why side letters of this form must be conceptualized as separate to the main agreement, is that they have only been formally agreed to by two contracting states.

C What is the relationship of the ISDS side letters to the CPTPP?

Having established that New Zealand's ISDS side letters constitute separate treaties under international law, it is still not immediately clear how they should be analyzed pursuant to the Vienna Convention on the Law of Treaties. All the member states to the CPTPP are party to the Convention, except for Singapore and Brunei.⁹³ The principle difficulty with conceptualizing these side letter as an ‘amendment’ is that they were not agreed ‘subsequent’ to the main treaty, but instead signed at the same time. All the side letters to the CPTPP were signed by member states on the 8 March 2018, the same day as the main treaty. It is unclear the exact chronological order of the signatures to the relevant documents, however it seems unlikely any significant legal consequence should turn on this. The question remains, did a state party ever express consent to be bound by the provisions of the main treaty if it was simultaneously adopting an inconsistent one?

⁹³ United Nations Treaty Collection “Vienna Convention on the Law of Treaties” < treaties.un.org >.

1 Instrument related to the treaty

The closest the Convention comes to the concept of a ‘side letter’ is the reference to an “instrument related to the treaty” in art 31.⁹⁴ Article 31 sets out general rules for interpretation, specifically that a treaty shall be interpreted in good faith, in accordance with the context and in the light of its object and purpose.⁹⁵ Article 31(2)(b) provides that, in addition to the treaty’s text, preamble and annexes, the context includes:⁹⁶

Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

This fairly neatly describes the character of some side letters, albeit there is uncertainty whether such side letters can be taken as “accepted by the other parties”. In a 1994 territorial dispute between Chad and Libya, the International Court of Justice was called to interpret the meaning of a 1955 treaty, their conclusions were reinforced by reference to another treaty which the parties had entered into at the same, the Convention of Good Neighborliness between France and Libya.⁹⁷ This is a demonstration of “an instrument related to the treaty” under art 31.⁹⁸ Side letters that form memorandums of understanding regarding the interpretation of certain provisions would likely also be considered “instruments related to the treaty” for the purposes of art 31(2)(b). For example, the side letter with Vietnam confirming that the obligations in the CPTPP relating to pharmaceutical marketing do not prevent countries from establishing exceptions and limitations,⁹⁹ would form part of the context of interpreting those provisions. In regards to the ISDS side letters however, they go beyond merely clarifying the *context* of the agreement – they actually

⁹⁴ VCLT, art 31(2)(b).

⁹⁵ VCLT, art 31(1).

⁹⁶ VCLT, art 31(2)(b).

⁹⁷ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 26 at [53].

⁹⁸ Jean-Marc Sorel and Valérie Boré Eveno “Article 31 Convention 1969” in Oliver Corten and Pierre Klein (ed) *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, New York, 2011) 805 at 824.

⁹⁹ Exchange of Letters constituting an Understanding between the Government of New Zealand and the Government of Vietnam on Pharmaceutical Marketing (signed 8 March 2018, not yet in effect).

change the agreement itself by adding and removing obligations. Article 31 on its own is therefore insufficient to describe the relationship between these side letters and the main agreement.

2 *Reservations*

Given that the ISDS side letters withdraw New Zealand's consent to certain CPTPP provisions and that they were concluded at the same time as the agreement, they share some conceptual similarity to the mechanism of 'reservations'. Article 19 provides that when "signing, ratifying, approving or acceding to a treaty" a state may formulate a reservation subject to certain conditions.¹⁰⁰ However, a reservation is explicitly defined as a "*unilateral* statement... which purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state" [emphasis added].¹⁰¹ The side letters are not unilateral statements, but rather bilateral agreements. A conventional reservation would be if New Zealand had unilaterally stated it does not agree to the ISDS provisions in Chapter 9, Section B and thereby did not give consent to arbitration to investors from any CPTPP member state. Instead, the side letters only modify the agreement in regards to some of the CPTPP member states on a reciprocal basis.

The side letter mechanism consists of two documents that are exchanged. A conceivable interpretation is that when each country signs its respective letter this constitutes a unilateral reservation which purports to exclude parts of the agreement, but in a limited way (i.e. only in relation to the other member state). Rather than conceptualizing side letters as a bilateral agreement, they could be conceptualized as two unilateral reservations by two states with the same terms. While this may be unconventional, the Vienna Convention contemplates a lack of uniformity in the use of reservations by including in the definition "however phrased or named".¹⁰² This interpretation could be supported by the wording of art 21 of the Vienna Convention which refers to "[a] reservation established *with regard to*

¹⁰⁰ VCLT, art 19.

¹⁰¹ VCLT, art 2(1)(d).

¹⁰² VCLT, art 2(1)(d).

another party” [emphasis added].¹⁰³ This language implies a reservation need not apply to *all* the parties generally. The following paragraph states “[t]he reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*”.¹⁰⁴ As with many aspects of international treaty law, the nature and boundaries of what constitutes a ‘reservation’ remain relatively opaque, the 1953 ILC report states “the subject of reservations to multilateral treaties is one of unusual – in fact baffling – complexity”.¹⁰⁵

3 *Successive treaties*

Side letters are separate treaties which impact the provisions in the CPTPP, a logical starting point therefore would be art 30 of the Vienna Convention which relates to the “[a]pplication of successive treaties to the same subject matter”.¹⁰⁶ The temporal factor potentially complicates analysis as the article refers numerous times to “the earlier treaty” and “the later treaty”.¹⁰⁷ This fits inelegantly with a treaty which relates to the same subject matter but was contemporaneous rather than “successive”. Article 30 is stated to be “without prejudice to article 41”,¹⁰⁸ art 41 provision is potentially more apt for analysis anyway.

4 *Inter se modification*

Article 41 of the Vienna Convention relates to “agreements to modify multilateral treaties between certain parties only”.¹⁰⁹ In commentary on the Convention, this is often referred to as ‘inter se’ modification, meaning ‘between or among themselves’.¹¹⁰ This provision is most often applied to situations where an entirely new, self-contained treaty is agreed

¹⁰³ VCLT, art 21(1).

¹⁰⁴ VCLT, art 21(2).

¹⁰⁵ Alain Pellet “The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur” (2013) 24(4) EJIL 1061 at 1063.

¹⁰⁶ VCLT, art 30.

¹⁰⁷ VCLT, art 30(2) and (4).

¹⁰⁸ VCLT, art 30(5).

¹⁰⁹ VCLT, art 41.

¹¹⁰ Anne Rigaux and others “Article 41 Convention of 1969” in Oliver Corten and Pierre Klein (ed) *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, New York, 2011) 986 at 987.

between member states, often years after the original agreement.¹¹¹ But there is nothing on the wording of the provision which limits application to these situations. Article 41 also does not contain the temporal language of “earlier” and “later” treaty as found in art 30. However it could be argued that implicit in the concept of ‘modify’ there must be an agreement preexisting to be the subject of ‘modification’ – importing a temporal dimension to art 41. Article 41 provides that “[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone...”¹¹² This article seems to quite effectively describe the process which is occurring through the side letter mechanism: two states are getting together to modify, as between themselves, a provision in the main agreement. Article 41 appears to be the most appropriate conception of the side letter mechanism. It is therefore necessary to consider, in the next section, whether the ISDS side letters meet the substantive conditions of inter se modification set out in art 41(a) and (b).

5 *Inter se suspension*

Before moving to the substantive requirements, there is potentially one further part of the Vienna Convention with which to conceptualize the ISDS side letters. Article 58 of the Convention mirrors the wording of art 41 almost exactly, except that it applies to the “suspension of the operation of a multilateral treaty” rather than “agreements to modify multilateral treaties”.¹¹³ In determining the difference between “suspension” and “modification” the boundaries of definition again become murky.¹¹⁴ Article 58 appears in Section 3 of the Convention relating to “termination and suspension” of treaties. The concept of ‘suspension’ is therefore perhaps closer to the concept of ‘termination’ That is, wholesale withdrawal from the treaty. On the other hand, art 58 appears to contemplate only suspending parts of a treaty, it refers to an agreement to “suspend the operation of *provisions* of the treaty” rather than “suspend operation of the *treaty*” [emphasis added]. The side letters with Australia and Peru seem to fit more naturally under article 58 because

¹¹¹ See generally Rigaux and others, above n 110.

¹¹² VCLT, art 41(1).

¹¹³ VCLT, art 58(1).

¹¹⁴ Marie-Pierre Lanfranchi, above n 91, at 1312.

they suspend the operation of the ISDS clause entirely. The side letters with Brunei, Vietnam and Malaysia fit more naturally under article 41 because they modify the regime in Chapter 9, Section B to require New Zealand to grant consent. It is also possible that art 58 could simply be viewed as a subset of art 41.

D Are the ISDS side letters valid under the Vienna Convention?

Under the framework set out in the Vienna Convention it is possible to conceptualize the process which New Zealand has embarked upon regarding ISDS in a number of different ways. The ISDS side letters could be conceptualized as reservations under art 19, inter se modifications under art 41, or inter se suspension under art 58. However, fortunately for present purposes, the analysis required under each article to determine whether the side letters are valid is reasonably similar. While conceptual coherence generally would benefit from a definitive characterization, it is unlikely the result will turn on which article the side letters are analyzed under.

Under art 19, a state may formulate a reservation unless:¹¹⁵

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

The requirements for inter se suspension in art 58 are worded consistently with art 41.

Under art 41, two or more states may make inter se modifications if:¹¹⁶

- (a) The possibility of such a modification is provided for by the treaty; or
- (b) The modification in question is not prohibited by the treaty and:

¹¹⁵ VCLT, art 19.

¹¹⁶ VCLT, art 41.

- (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

The conditions in art 19(a) and (b), art 41(a) and art 58(a) reflect the fact that the Vienna Convention provides “residual” rules, which will normally be superseded by express provisions within a treaty. If the treaty in question expressly deals with the possibility of reservations or modification any agreement must be in line with whatever the treaty states. On the other hand, if there are no express provisions the Vienna Convention’s residual rules apply. Article 41(b)(ii) is similar to art 19(c) in this regard, both prohibit changes which are incompatible with the treaty’s “object and purpose”. However, whereas art 19(c) refers simply to a reservation which is “incompatible with the object and purpose of the treaty”, art 41(b)(ii) refers to “effective execution” and “as a whole”. What is the significance of the different wording? On one view, it appears to be a less stringent standard. It implies that a modification may infringe on the object and purpose of the treaty to a certain extent, as long as the object and purpose is preserved “as a whole”.¹¹⁷ Interestingly, art 58, which mirrors the wording of art 41 in every other respect, adopts the unqualified wording of art 19(c). Article 58(1)(b)(ii) states a suspension must “not [be] incompatible with the object and purpose of the treaty”.¹¹⁸ Jonas and Saunders suggest the caveated language was not included in art 58 because the drafters of the Vienna Convention saw more threat to a treaty’s object and purpose from suspension as opposed to mere modification.¹¹⁹ This section will first consider the express provisions in the CTPP and then whether inter se changes conflict with its object and purpose.

¹¹⁷ David Jonas and Thomas Saunders “The Object and Purpose of a Treaty: Three Interpretive Methods” (2010) 43(3) *Vanderbilt Journal of Transnational Law* 565 at 575.

¹¹⁸ VCLT, art 58(1)(b)(ii).

¹¹⁹ Jonas and Saunders, above n 117, at 575.

1 Express treaty provisions

An example of an express provision prohibiting reservations can be found in the Rome Statute of the International Criminal Court, which simply states “[n]o reservation may be made to this Statute.”¹²⁰ An example of provision governing inter se modification can be found in the European Convention on Extraditions, which states:¹²¹

The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.

In another field relevant to international investment law, some have argued the ICSID Convention, which provides the forum for many investor-state arbitrations, prohibits aspects of inter se modification.¹²² In the context of reforming ISDS to add an appellate mechanism, it is difficult to achieve the necessary full consensus of parties to the ICSID Convention. Calamita argued that inter se modification of the ICSID Convention through an opt-in convention to add an appellate mechanism would be invalid under art 41 of the Vienna Convention.¹²³ The ICSID Convention provides that disputes settled under the Convention “shall not be subject to any appeal or to any other remedy except those provided for in this Convention”.¹²⁴ This is not an express provision relating to inter se modification, but arguably it is a prohibition on modification within the meaning of art 41(1)(b). In this interpretation, treaty wording requiring states to “not” do something is equivalent to prohibiting modification to that effect. Others have argued that so called ‘implied’ prohibitions are not covered by art 41(1)(b), the Vienna Convention provides that prohibition is only ‘implied’ when the modification conflicts with sub-clauses (i) and

¹²⁰ Rome Statute of the International Criminal Court, art 120.

¹²¹ European Convention on Extradition, art 28(2).

¹²² Giovanni Zarra “The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?” (2018) 17(1) Chinese Journal of International Law 137 at 179.

¹²³ N Jansen Calamita “The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime” (2017) 18 Journal of World Investment & Trade 585 at 609.

¹²⁴ ICSID Convention, art 53.

(ii).¹²⁵ There is a resulting debate about whether awards rendered under a new investment court system set up in agreements like TTIP and CETA would be enforceable as ICSID awards.¹²⁶

The CPTPP itself constitutes an *inter se* modification of an earlier agreement because all the member states are party to the treaties establishing the multilateral trading system of the WTO. The CPTPP is often referred to as a ‘WTO-plus’ agreement.¹²⁷ As New Zealand chief negotiator, Vangelis Vitalis, stated “the CPTPP provides additional and enhanced benefits and preferences over and above the existing WTO benefits”.¹²⁸ Such *inter se* modification is permissible under the Vienna Convention because art 34 of GATT 94 and art 4 GATS enable member states to modify parts of their treaty obligations to obtain deeper integration among a limited number of member states.¹²⁹ The question of so-called ‘WTO-minus’ agreements, which purport to restrict trading between WTO member states, is a source of controversy.¹³⁰ The WTO does not provide rules on this area, so one must consider whether the modifications derogate from the object and purpose.

In any event, the CPTPP is silent as to the possibility of reservations or *inter se* modification. The only provision relating to amendment in the CPTPP is Article 30.1 in the Final Provisions Chapter. However this only applies to amendments that are agreed to by *all* parties.

¹²⁵ Brian McGarry and Josef Ostránský “Modifying the ICSID Convention under the Law of Treaties” (11 May 2017) EJIL: Talk! <www.ejiltalk.org>.

¹²⁶ August Reinisch “Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration” (2016) 19 JIEL 761 at 785.

¹²⁷ For example see Vangelis Vitalis “Opening Statement to the Foreign Affairs, Defence and Trade Committee: The National Interest Analysis (NIA) for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership” (3 May 2018) at [27], [29] and [84].

¹²⁸ At [29].

¹²⁹ GATT 1994, art 34; GATS, art 4.

¹³⁰ See Rudolf Adlung and Sébastien Miroudot “Poison in the Wine: Tracing GATS-Minus Commitments in Regional Trade Agreements” (2012) JWT 1045 at 1056.

Given that the CPTPP contains no provisions restricting parties' ability to enter reservations or inter se modifications, the ISDS side letters would only be invalid if they derogated from the object and purpose of the treaty.

2 *Object and purpose*

Whether bilaterally removing ISDS from a multilateral agreement derogates from the treaty's object and purpose is the central question of New Zealand's side letter method. It is a consideration which goes to the heart of New Zealand's approach to dividing up a multilateral agreement into a web of bilateral segments.

The phrase "object and purpose" is commonly used term of art in the law of treaties, however the phrase itself still does not have a clear means of application.¹³¹ The CPTPP is such a wide ranging agreement that it is difficult to ascertain a single object and purpose. The nature of omnibus agreements like the CPTPP is that each chapter provides states with a harmonisation of laws in diverse areas. Arguably each chapter could be framed to have its own object and purpose which contributes to the broader object and purpose of the entire agreement. It may be possible for an inter se modification to derogate from the object and purpose of an individual chapter, but not derogate from the object and purpose of the CPTPP "as a whole". The CPTPP contains provisions which are broadly similar to the unsuccessful Multilateral Agreement on Investment. If New Zealand had concluded the same side letters in relation to the MAI there may have been a clearer case that it derogated from the treaty's "object and purpose". This is because providing a unified framework for investor disputes was at the very core of the multilateral project for that treaty. On the other hand, it could be argued that certain treaty provisions are either sufficiently important or they are not – their relative importance, for the purpose of art 41, should not be able to be diluted by the mere fact that the treaty covers other areas of law.

Inter se modification of a multilateral disarmament treaty would undoubtedly derogate from the "object and purpose" of the treaty as all states derive benefit from the universal

¹³¹ Jonas and Saunders, above n 117, at 567.

application, this was the sole example given by the ILC during drafting.¹³² Commentators have also suggested human rights treaties, environmental protections, and treaties providing nuclear weapon free zones all require uniform application and therefore cannot be divided into bilateral segments.¹³³ Presumably in the context of environmental treaties it is permissible for states to agree inter se to *higher* standards of protection but not *lower*. To draw an analogy to the present case, New Zealand has seemingly agreed inter se to *lower* standards of investment protection for certain investors.

In the original preamble to the TPP incorporated into the CPTPP, amongst other things, the parties resolve to “establish a comprehensive regional agreement that promotes economic integration to liberalise trade and investment” and “establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules”.¹³⁴ In its side letter arrangements, New Zealand has not modified the *rules* pertaining to investment, but it has removed the key mechanism to *enforce* those rules. This is major aspect of the CPTPP Investment Chapter. If parties can pick and choose who the enforcement mechanism applies this prima facie undermines the effectiveness of the collective rules-based order.

The ability to bring an ISDS claim for breaching an investment protection is broadly similar to the ability for states to bring a trade dispute to the WTO under the Dispute Settlement Understanding. Vidigal reviewed the incidence of states contesting the jurisdiction of the WTPO dispute settlement system due to the effect of subsequent inter se agreements.¹³⁵ In *Mexico – Soft Drinks*, the panel declined Mexico’s submission that it should not exercise jurisdiction because of the existence of a ‘broader dispute’ involving NAFTA obligations. The Appellate Body confirmed that panels may not decline jurisdiction, even when

¹³² Reinisch, above n 126, at 773.

¹³³ Rigaux and others, above n 110, at 1004.

¹³⁴ CPTPP, preamble.

¹³⁵ Geraldo Vidigal “From Bilateral to Multilateral Law-making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO” (2013) 24 EJIL 1027 at 1043.

challenged with claims that a dispute could find a more appropriate forum elsewhere.¹³⁶ In *EC – Sugar* the Appellate Body rejected the argument that WTO adjudicators should apply the principle of estoppel where parties have agreed to abstain from bringing a dispute to the WTO.¹³⁷ Vidigal concludes his analysis by stating:¹³⁸

...both reports seem to point in the same direction: restrictions on the jurisdiction (or on the legal findings) of WTO panels may not derive from *inter se* modifications, but require a basis in multilateral norms.

One must, however, be cautious with drawing direct analogies between the ability to institute an ad hoc arbitral tribunal and the standing dispute settlement body of the WTO, which is described as “the central pillar of the multilateral trading system” and a “unique contribution to the stability of the global economy”.¹³⁹ Whether *inter se* modification derogates from the “object and purpose” of the treaty depends on the nature of the treaty obligations themselves. The ILC has characterised multilateral agreements as either ‘reciprocal’ treaties or ‘absolute’ treaties.¹⁴⁰ According to Koskenniemi, *inter se* agreements are usually acceptable in relation to reciprocal treaties, “their permissibility followed from the fact that they normally only affected bilateral relationships or, if their effects went further, were positive from the perspective of the other parties”.¹⁴¹

There is disagreement in the literature whether the obligations in international economic law are bilateral or collective in nature, the most discussed example being the WTO. Carmody argues that the WTO agreements protect the “collective expectations about the

¹³⁶ *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)* WT/DS308/AB/R, 6 March 2006 (Report of the Appellate Body) at 54.

¹³⁷ *European Communities – Export Subsidies on Sugar* WT/DS265/AB/R, 28 April 2005 (Report of the Appellate Body) at 312.

¹³⁸ Vidigal, above n 135, at 1044.

¹³⁹ World Trade Organization “A Unique Contribution” <www.wto.org>.

¹⁴⁰ Martti Koskenniemi *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (International Law Commission, A/CN.4/L.682, 2006) at [310].

¹⁴¹ At [310].

trade-related behaviour of governments”.¹⁴² This makes the rules “unquantifiable and indivisible and therefore fundamentally unitary in nature”.¹⁴³ Contrary to Carmody, Pauwelyn argues that, although the WTO is ostensibly a multilateral contract between more than 150 countries, it consists of a bundle of bilateral obligation.¹⁴⁴

Despite the appeal of uniformity of ISDS in the abstract, for the purposes of art 41(1)(b)(ii) that uniformity is not a rigid necessity. Sub-paragraphs (i) and (ii) overlap significantly because where inter se modification affects the rights of third parties this is usually because the nature of the obligation is ‘collective’. It is difficult to see how the rights of Chile are affected by the fact that investors from Australia cannot bring an ISDS claim against New Zealand. This is clearly different from a nuclear disarmament treaty where the provisions cannot operate effectively without every party applying them uniformly. Arguably there could be downstream flow-on affects from making investing in New Zealand theoretically “more risky”, such as the relative cost of setting up supply chains. However such suggestions are necessarily speculative and imprecise. Given the still early-stages of the multilateral framework for investments, it would be premature to conclude the CPTPP Investment Chapter gives rise to ‘absolute’ obligations.

E What happens if the ISDS side letters are not valid?

This paper has concluded that New Zealand’s ISDS side letters most likely meet the substantive requirements in art 41(1)(b)(i) and (ii). However, for completeness, it is still useful to consider what the practical effect would be if an international tribunal determined that they did not.

From the perspective of an investor from an excluded member state who believes they have suffered a breach of an investment protection in Chapter 9, they might be able to argue the side letter removing ISDS is invalid and therefore there is jurisdiction for an arbitral

¹⁴² Chios Carmody “WTO Obligations as Collective” (2006) 17 EJIL 419 at 419.

¹⁴³ At 421.

¹⁴⁴ Joost Pauwelyn “A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?” (2003) 12(5) EJIL 907 at 908.

tribunal to decide their claim. New Zealand provided prior consent to arbitration for all member states in art 9.20. If this consent was not validly revoked then arguably an Australian investor, for example, should be able to bring a claim.

One difficulty is that the Vienna Convention does not provide express guidance on the *consequence* of non-conformity with art 41. In 1963, members of the ILC proposed wording which stated “any party whose interests are seriously affected shall be entitled to invoke the nullity of the second treaty”.¹⁴⁵ However, the sanction of nullity was rejected by the ILC after heated discussions.¹⁴⁶ In this situation there is the added complication that the party objecting to the validity of the modification is not an adversely affected third member state, but a national of a member state whose government had freely entered into the agreement. The argument from an investor in this situation is that the inter se modification adversely affected *their* rights, not the rights of a third party to the CPTPP. This objection does not fall squarely within the ambit of art 41.

Therefore even if the side letters do not comply with the Vienna Convention, this does not necessarily mean an arbitral tribunal would find a lack of jurisdiction for an ISDS claim - especially in light of the clear contractual wording, freely entered into by two sovereign states at the same time as the main agreement.

IV Effectiveness of New Zealand’s side letters

In Part III this paper concluded that, as a matter of law, New Zealand’s side letters are a valid treaty mechanism. However this is only one part of the equation. The practical effectiveness of New Zealand’s segmentation approach can be questioned in a number of ways.

Firstly, in a globalized world featuring international corporations with complicated supply chains, the concept of investors with discrete national identities may increasingly become

¹⁴⁵ Rigaux and others, above n 110, at 1008.

¹⁴⁶ At 1008.

a legal fiction. New Zealand's compromise with the CPTPP affords access to ISDS to investors from only some member states. The apparent result is that New Zealand has determined there is a practical benefit in accepting ISDS liability for some countries' investors but not others. The inherent logic of this approach requires that individual investors are in fact constrained within national borders. This approach places a lot of reliance on the CPTPP's 'denial of benefits' clause, which prevents investors from engaging in 'nationality planning' to benefit from the provisions of an IIA.

Secondly, the CPTPP exists within the "spaghetti bowl" of intertwining investment treaties.¹⁴⁷ Excluding recourse to ISDS under the CPTPP for certain countries is essentially futile if investors from those same countries can bring a claim under a different investment treaty. It is therefore necessary to consider the interrelationship between the CPTPP and New Zealand's prior agreements relating to international investment.

The third consideration looks at the effectiveness of New Zealand's side letter approach in the furtherance of its stated policy objective. While the use of side letters, arguably, restricts the expansion of New Zealand's ISDS liability in the short term, this does not account for the fact that future accession will likely result in continual expansion of ISDS coverage.

A Are investors constrained within national boundaries?

In his discussion of the multilateralization of international investment law, Schill notes that:¹⁴⁸

¹⁴⁷ The term "spaghetti bowl" describes the way free trade agreements have a complicated overlapping effect. First used in Jagdish Bhagwati *US Trade Policy: The Infatuation with FTAs* (Columbia University, Discussion Paper Series No 726, April 1995) at 4.

¹⁴⁸ Stephan Schill "Ordering Paradigms in International Investment Law: Bilateralism – Multilateralism – Multilateralization" in Zachary Douglas (ed) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014) at 122.

Nationality planning shows above all that ordering international investment relations on a truly bilateral basis with rights and benefits accruing to nationals of one specific home state is an increasingly elusive undertaking.

Treaty shopping is the practice of deliberately structuring one's investments in order to take advantage of the protection of a particular BIT (or IIA) of the host state.¹⁴⁹ Treaty shopping can either involve planning the nationality of a natural person, or the nationality of a legal person (e.g. a corporation).¹⁵⁰ This can be seen as generally undesirable as it extends the reduced scope of the state's regulatory policy tools to those who were never intended to benefit from them, disrupting the balance of the quid quo pro, negotiated position. Treaty shopping undermines the reciprocity of IIAs and therefore undermines the legitimacy of the ISDS mechanism.¹⁵¹ Investors are able to gain the benefits of the treaty, without their home government undertaking any of the reciprocal obligations of the agreement. Treaty shopping can cause the benefits of the IIA to extend to nationals of a state who was not party to the agreement, or investors to bring an ISDS claim against their own government by incorporating in another state.

Generally foreign investors may be tempted to engage in treaty shopping where the host state has no IIA with their home state but does with another state. Alternatively, the host state may have an IIA with the investor's home state but have an IIA on better terms with another state.¹⁵² The better terms may be in relation to substantive protections or in relation to procedure (such as the ease of invoking ISDS mechanism). In the present context of the CPTPP, treaty shopping could allow investors to benefit from ISDS even though their home state has expressly excluded the possibility by side letter.

¹⁴⁹ Kenneth Vandeveld *Bilateral Investment Treaties* (Oxford University Press, New York, 2010) at 162.

¹⁵⁰ Eujung Lee *Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals?* (London School of Economics and Political Science, Working Paper Series No 15-167, February 2015) at 5.

¹⁵¹ At 2.

¹⁵² Mathew Skinner, Cameron Miles and Sam Luttrell "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3(3) JWELB 260 at 267.

In 2015, the London School of Economics and Political Science conducted a study to determine the prevalence of treaty shopping in international investment arbitration.¹⁵³ The study considered the number of arbitration cases where the claimant had a parent-company headquartered in another state.¹⁵⁴ There has been an increasing trend of potential treaty shopping cases since 2000, with 66 cases out of the 499 ISDS cases in the UNCTAD database potentially involving treaty shopping.

In some cases, even where an arbitral tribunal has acknowledged evidence of treaty shopping practices it will accept a claimant's jurisdiction on the basis they are technically a legal person of the contracting state.¹⁵⁵ Some IIAs define 'investor' on the basis of incorporation alone however others require that actual business is conducted in the contracting state.¹⁵⁶ For example French BITs usually contain the concept of *siège social* in their definition of 'investor' which requires some form of genuine connection.¹⁵⁷ The CPTPP defines "investor of a Party" widely as "a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party".¹⁵⁸ An "enterprise" is simply "any entity constituted or organized under applicable laws".¹⁵⁹ Any investor from a non CPTPP member state (or a CPTPP member state excluded by side letter) could set up a shell company within one of the contracting states as an 'enterprise' and prima facie be considered an "investor of a Party".

One of the mechanisms by which states attempt to counteract treaty shopping is by including a 'denial of benefits' clauses within the agreements. The CPTPP Investment Chapter includes a denial of benefits clause in art 9.15.¹⁶⁰ These clauses are designed to

¹⁵³ Lee, above n 150.

¹⁵⁴ Lee, above n 150.

¹⁵⁵ For example see *Saluka Investments BV v the Czech Republic (Partial Award)* PCA No 3001-04, 17 March 2006 at [241]; *Yukos Universal Ltd v Russia (Interim Award on Jurisdiction and Admissibility)* PCA No AA 227, 30 November 2009 at [411].

¹⁵⁶ Skinner and others, above n 152, at 270.

¹⁵⁷ At 270.

¹⁵⁸ CPTPP, art 9.1.

¹⁵⁹ CPTPP, art 1.3.

¹⁶⁰ CPTPP, art 9.15.

prevent the benefits of the treaty being extended to investors who have set up shell companies in a contracting state. The clause gives contracting states the right to deny treaty protection to investors who: (1) are owned or controlled by a person of a non-Party or the denying Party;¹⁶¹ and (2) has no substantial business activities in the territory of a Party to the agreement.¹⁶² Despite the worthy objective of the denial of benefits clause, the provision faces both substantive and procedural shortfalls.

The first issue is whether the denial of benefits clause operates automatically to exclude investors that are only operating through shell companies. In *Yukos v Russia* it was held that the denial of benefits clause did not automatically apply, instead because the clause only “reserves the right” to deny benefits, that right must have been *exercised* before a party is excluded from protection.¹⁶³ This wording contrasts to the ASEAN Framework on Services which states that “benefits... *shall* be denied to a service supplier who is not engaged in substantive business operations”.¹⁶⁴ The CPTPP clause is the same as the US Model BIT, it uses the term “a Party *may* deny the benefits...”¹⁶⁵ This wording similarly suggests that denial of benefits does not automatically deny benefits to shell companies.

If the respondent state must take affirmative steps to invoke the denial of benefits clause a second issue is at what stage the benefits need to be denied. The denial of benefits clause in the CPTPP provides no explicit guidance on this issue. There are two lines of interpretation that have emerged from arbitral tribunals on this point. One line of authority, including cases like *Rurelec v Bolivia* and *Ulysseas v Ecuador*,¹⁶⁶ is that the denial of benefits clause must be invoked no later than the statement of defence.¹⁶⁷ The more problematic approach has been seen in interpretations of the Energy Charter Treaty in cases

¹⁶¹ CPTPP, art 9.15(1)(a).

¹⁶² CPTPP, art 9.15(1)(b).

¹⁶³ *Yukos v Russia*, above n 155, at [456].

¹⁶⁴ Lindsay Gastrell and Paul-Jean Le Cannu “Procedural Requirements of ‘Denial-of-Benefits’ Clauses in Investment Treaties: A Review of Arbitral Decisions” (2015) 30(1) ICSID Review 78 at 83.

¹⁶⁵ CPTPP, art 9.15.

¹⁶⁶ *Guaracachi America Inc and Rurelec PLC v Bolivia (Award)* PCA No 2011-17, 31 January 2014 at [376]-[384]; *Ulysseas Inc v Ecuador (Interim Award)* PCA No 2009-19, 28 September 2010 at [174]-[174].

¹⁶⁷ Gastrell and Le Cannu, above n 164, at 84.

such as *Plama v Bulgaria*.¹⁶⁸ Tribunals have generally held that the clause must be invoked prior to the dispute arising, or prior to the investor having made investments in the country.¹⁶⁹ The problem with this approach from the respondent state's perspective, is that it requires the government to monitor every incoming investment and look behind the corporate veil to determine whether or not it is being funneled through a shell company. If a tribunal were to adopt this interpretation of the CPTPP, it would allow investors that are clearly engaging in treaty shopping to bring an ISDS claim simply because the New Zealand did not invoke the clause early enough.

Even if New Zealand were to successfully comply with the procedural requirements of invoking the denial of benefits clause, the clause may nonetheless be ineffective in preventing treaty shopping. Article 9.15(1)(b) provides that benefits may be denied where the enterprise:¹⁷⁰

...has no substantial business activities in the territory of any Party other than the denying Party.

Even after decades of such clauses being included in investment agreements, the meaning of "substantial business activity" remains unclear. The Tribunal in *Amto v Ukraine* gave guidance stating 'substantial' means "of substance, and not merely of form... materiality, not the magnitude of the business activity, is the decisive question".¹⁷¹ While this may address companies which are entirely on paper, it still permits free-riding parties to frustrate the purpose of the denial of benefits clause with *de minimis* substantive activity.

There is some evidence that treaty shopping practices are becoming more widespread and this remains a possibility within the CPTPP. As it stands, investors from non CPTPP-countries (or countries excluded by side-letters) can structure their investments in a way to

¹⁶⁸ *Plama Consortium Ltd v Bulgaria (Decision on Jurisdiction)* ICSID ARB/03/24, 8 February 2005 at [157]-[165].

¹⁶⁹ Gastrell and Le Cannu, above n 164, at 84.

¹⁷⁰ CPTPP, art 9.15(1)(b).

¹⁷¹ *Amto LLC v Ukraine (Final Award)* SCC No 080/2005, 26 March 2008 at [69].

bring ISDS claims against New Zealand or vice versa. The potential for treaty-shopping depends on the uncertainty of how the denial of benefits clause would be interpreted by a tribunal (for example the threshold for “substantial business activities” and the timing for invoking the clause). However this uncertainty may work to prevent the practice as well. An enterprise may not want to use its resources and incur the expense of restructuring its business through a shell company, purely to defeat a denial of benefits clause when it is uncertain whether a tribunal would ultimately grant them jurisdiction. However the blurry distinction surrounding the nationality of investors takes away from a purely bilateral approach to investment protection.

B How does the CPTPP interact with New Zealand’s previous IIAs?

Every party to the CPTPP has entered into various other bilateral or multilateral investment agreements with other CPTPP parties. The CPTPP sits within a context of around 40 earlier agreements which apply between different combinations of its member states.¹⁷² New Zealand currently has separate investment related agreements in force with Malaysia, Singapore and Australia; and all the Southeast Asian countries are included in the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA). This section will first consider how the CPTPP itself interacts with New Zealand’s earlier agreements, then it will address the interaction of the ISDS side letters.

1 Prioritization of the CPTPP

The priority of treaties is generally determined by the conflict clause set out within the treaties themselves. If there is no such clause, Article 30 of the Vienna Convention sets out residual rules - the earlier treaty applies only to the extent that it is compatible with the later treaty.¹⁷³ However, within the field of international investment law there is a second dimension to treaty prioritization. Under the ISDS mechanism investors are able to bring an arbitration claim for a treaty breach against a State party. If the State party has entered

¹⁷² Jean Ho “Investment Protection under Successive Treaties” (2017) 32(1) ICSID Review at 58 at 61.

¹⁷³ VCLT, art 30(3).

into more than one investment agreement containing an ISDS clause with the investor's home state, the investor is able to elect under which treaty to bring the claim.¹⁷⁴ It can naturally be expected that investors will select the investment treaty under which their claims have the highest likelihood of succeeding.

The conflicts clause of the CPTPP is contained in art 1.2 of the agreement.¹⁷⁵ This is a straight forward conflicts clause which provides that any existing IIAs are not altered by the CPTPP Investment Chapter, the CPTPP will instead “coexist with their existing international agreements”.

The second paragraph of art 1.2 contemplates parties consulting “with a view to reaching a satisfactory solution” where the provision of another agreement is inconsistent with the CPTPP. However the footnote to art 1.2(2) provides an important clarification for what can be considered an “inconsistency”. It provides that simply because an earlier agreement provides more favourable conditions for investors this does mean the agreements are inconsistent.¹⁷⁶

Article 1.2 subordinates the CPTPP investment chapter to all earlier IIAs. It still requires host states to comply with earlier treaties which confer more favourable treatment on investors. This allows for simultaneous compatibility with both the CPTPP and earlier treaties.¹⁷⁷ In the negotiation of the TPP, the investment chapter was frequently referred to as the new ‘gold standard’.¹⁷⁸ This was because it was designed to more carefully balance the interests of states vis-à-vis investors. This was principally achieved by providing more detailed guidance on how various provisions should be interpreted, rather than leaving this exercise to the discretion of arbitrators. However the fact that more investor-friendly IIAs continue in force means that the new ‘gold standard’ will likely not become operational, at

¹⁷⁴ Ho, above n 172, at 61.

¹⁷⁵ CPTPP, art 1.2.

¹⁷⁶ CPTPP, art 1.2(1) (footnote 1).

¹⁷⁷ Ho, above n 172, at 66.

¹⁷⁸ José E Alvarez “Is the Trans-Pacific Partnership’s Investment Chapter the New ‘Gold Standard?’” (2016) 27 VUWLR 503.

least in bilateral relationships with a pre-existing investment agreement. For example, art 29.5 prevents investors bringing arbitration claims in respect to tobacco control measures. Such a carve-out is not present in earlier IIAs between the member states. Therefore investors could still commence a claim relating to tobacco control measures under the ISDS mechanism in an earlier treaty.

The negotiators of the TPP put forward three proposals for how to deal with the problem of overlapping treaties. The first proposal was that the TPP (now CPTPP) should replace all earlier overlapping treaties, as this would allow the new set of ‘best practice’ rules to swiftly come into effect.¹⁷⁹ This was the proposal argued for by New Zealand, Australia and Singapore. The second proposal was the one ultimately adopted, this allowed agreements to coexist and investors to choose which agreement gave them the greatest benefits.¹⁸⁰ The United States was the principal proponent for this option because it preserved the carefully tailored bargains in earlier treaties that were particular to the bilateral relationships.¹⁸¹ The third option was a hybrid approach where some sections of the TPP would replace overlapping treaties, while some sections would be subject to earlier agreements. This approach was ultimately rejected for the practical reason that it would be too cumbersome and time consuming to conduct this analysis for each provision of the entire agreement. There were numerous lengthy negotiations on this point and negotiators eventually “decided not to decide”.¹⁸² As Ho put it: “the impasse was finally broken with Article 1.2(1) of the TPP, which quietly handed the debate to the USA”.¹⁸³

For Australia’s part, it did seek to rectify this issue by way of side letter following the completion of the TPP. Australia signed side letters with Vietnam, Mexico and Peru

¹⁷⁹ Deborah Elms and C L Lim, ‘An Overview and Snapshot of the TPP Negotiations’ in C L Lim, Deborah K Elms and Patrick Low (eds), *The Trans-Pacific Partnership—A Quest for a Twenty-First Century Trade Agreement* (CUP 2012) 21 at 35.

¹⁸⁰ At 35.

¹⁸¹ At 37.

¹⁸² At 37 – 38.

¹⁸³ Ho, above n 172, at 68.

terminating bilateral BITs which each contained ISDS provisions.¹⁸⁴ This limited the “spaghetti bowl” effect in relation to these countries. For example, investors from Mexico must now rely on the standard of protections in the CPTPP and cannot rely on the looser wording in its earlier 2005 agreement if they want to bring an arbitration claim against Australia. Australia did not terminate all its prior IIAs with member states however. The Investment Chapter of AANFTA remains in force. It could be used by investors from CPTPP member states instead of the CPTPP. Despite objection to the coexistence of earlier agreements during negotiations, New Zealand did not sign any side letters terminating its older investment agreements with CPTPP member states.

2 Prioritization of side letters

The issues with treaty prioritization are compounded by the added dimensions of New Zealand’s side letters amending the operation of the CPTPP.

As has previously been discussed, New Zealand’s side letters with Australia and Peru provide that no investor from those countries will have recourse to ISDS under the CPTPP. None of Australia’s previous investment agreements with New Zealand contain an ISDS clause. Strictly speaking, Australia and New Zealand are both party to AANFTA which contains an ISDS clause, but the two countries signed a side letter excluding ISDS from that agreement as well.¹⁸⁵ Therefore there is no issue with treaty prioritization in relation to Australia because ISDS is not permitted under any of them. The same is true for Peru. New Zealand has no pre-existing investment agreements with Peru. The side letters therefore provide certainty as to the status of Peruvian and Australian investors. Investors from these countries cannot bring arbitration claims against New Zealand, nor can New Zealand investors bring claims against these countries. A remedy for any breach of

¹⁸⁴ See Australia Government Department of Foreign Affairs and Trade “TPP-11 and associated documents” <dfat.gov.au/>.

¹⁸⁵ Exchange of Letters constituting an Agreement between the Government of New Zealand and the Government of Australia on the Application of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area to the Australia-New Zealand Closer Economic Relations Trade Agreement and associated instruments B2009/02 (signed 27 February 2009, entered into force 1 January 2010).

investment protection must be pursued in the domestic courts. However this is still subject to the possibility of investors from these countries engaging in the types of treaty shopping discussed above, in order to bring their claims within the ambit of the CPTPP.

On the other hand, closer examination of the other side letters leads to a quite different result. In New Zealand's side letters with Malaysia, Vietnam and Brunei it is stated that no investor from those countries will have recourse to ISDS "except in accordance with [the side letter]". The conditions outlined in the side letters in essence makes recourse to ISDS dependent on New Zealand (or the other member state if it concerns a New Zealand investor) giving its consent.¹⁸⁶

The issue of treaty prioritization arises in relation to these side letters because New Zealand has other investment agreements in force with these countries. An ISDS clause is contained in the 2009 New Zealand-Malaysia Free Trade Agreement.¹⁸⁷ Malaysia, Brunei and Vietnam are also all party to AANZFTA, which provides for compulsory ISDS in Chapter 10, Section B.¹⁸⁸

In the absence of an express conflicts clause it could be argued that the side letters are successive treaties which relate to the same subject matter and therefore impliedly repeal the ISDS mechanisms in earlier agreements. As previously discussed, art 1.2 of the CPTPP provides that earlier agreements coexist with the CPTPP. If the initial access to ISDS remained in light of the new access under the CPTPP, there is no reason why the earlier access should be removed when a side letter removes the access under the CPTPP specifically. New Zealand signed separate side letters with Vietnam and Brunei confirming this interpretation. The side letter Vietnam states:¹⁸⁹

¹⁸⁶ NZ-Malaysia side letter, above n 61, at 2(c).

¹⁸⁷ Malaysia-New Zealand Free Trade Agreement, Chapter 10, Section B.

¹⁸⁸ AANZFTA, ch 11, art 20.

¹⁸⁹ Exchange of Letters constituting an Understanding between the Government of New Zealand and the Government of Vietnam on the Relationship between CPTPP and AANZFTA (signed 8 March 2018, not yet in force).

Nothing in the CPTPP will derogate from the rights and obligations of New Zealand or Viet Nam under AANZFTA. To the greatest extent possible, the Agreements will be interpreted consistently. Where AANZFTA or CPTPP provides different treatment for an exporter, service supplier or investor of New Zealand or Viet Nam, that exporter, service supplier or investor is entitled to claim the more favourable of the treatment accorded to that exporter, service supplier or investor under that Agreement.

While not technically a side letter, New Zealand also signed a Joint Declaration with Canada and Chile relating to ISDS.¹⁹⁰ This declaration makes no substantive changes to the investment chapter between the parties. Instead it reaffirms “the right of each Party to regulate within its territory to achieve legitimate policy objectives” and “recognise the strong procedural and substantive safeguards” that are included in the chapter. The New Zealand Trade Minister stated that the declaration provides that “[the Parties] will use investor-state dispute settlement responsibly”.¹⁹¹ However it is not states which choose to bring ISDS claims, it is investors within those states. The declaration therefore does not limit the scope of New Zealand’s potential ISDS liability. One aspect of the declaration actually seeks to make it easier for investors to bring claims, it states the Parties “intend to promote rules that reduce the costs of dispute settlement for SMEs [small-to-medium enterprises].”

In embarking on renegotiations of the TPP the New Zealand government stated “the investor-state dispute settlement mechanism had been one of our main concerns about the agreement” and that the signing of the ISDS side letters had been a “real achievement”.¹⁹² However, the numerous side letters seemingly have little practical effect. Of the countries whose investors would have had recourse to bring a claim against New Zealand under the TPP, only Peru has effectively given up that right. Investors from Canada and Chile are not bound by any statement in the Joint Declaration; Australia had already ruled out ISDS

¹⁹⁰ Joint Declaration on Investor State Dispute Settlement (signed 8 March 2018).

¹⁹¹ Hon David Parker “New Zealand signs side letters curbing investor-state dispute settlement” (press release, 9 March 2018).

¹⁹² Hon David Parker “New Zealand signs side letters curbing investor-state dispute settlement” (press release, 9 March 2018).

under the TPP; and Malaysia, Brunei and Vietnam still have full access to compulsory ISDS under the terms of AANZFTA and other bilateral agreements.

C What is the impact of further accession?

The National Interest Analysis to the CPTPP promotes the prospect of further economies acceding to the agreement.¹⁹³

It is envisaged that longer term, membership of CPTPP would expand to include other economies and, in so doing, further increase the value of the Agreement for New Zealand exporters... [The CPTPP] will be open for other economies to join. In this way it will act as a key stepping stone towards the objective of free and open trade within the region and beyond.

The CPTPP is open to accession by any APEC state, which includes the United States, China and Russia.¹⁹⁴ A non-APEC state may be also accede to the agreement if the member states agree.¹⁹⁵ Following a request to join the agreement a working group, open to all member states, will negotiate the terms and conditions for the accession.¹⁹⁶ Colombia and Thailand have already announced interest in joining the agreement.¹⁹⁷ The United Kingdom has also announced it is formally considering joining the CPTPP.¹⁹⁸ Even President Donald Trump has suggested the United States is considering re-joining.¹⁹⁹

In spite of the New Zealand government's policy not to accept ISDS in any future trade agreements, with the CPTPP is ratified, ISDS will be the default position within the major regulatory architecture of the Asia Pacific. The track record of the CPTPP negotiations

¹⁹³ CPTPP National Interest Analysis, above n 62, at 19.

¹⁹⁴ CPTPP, art 30.4(1).

¹⁹⁵ CPTPP, art 30.4(1).

¹⁹⁶ CPTPP, art 30.4(1).

¹⁹⁷ "Colombia had made request to join Pacific trade pact: Mexico" *Reuters* (online ed, June 16 2018); "Thailand wants to join CPTPP trade pact this year: deputy PM" *Reuters* (online ed, March 30 2018).

¹⁹⁸ Sam Sachdeva "Amid Brexit turmoil, a significant announcement" *Newsroom* (online ed, July 11 2018).

¹⁹⁹ Jordan Fabian and Vikki Needham "Trump to explore entering Pacific trade pact he once called 'a disaster'" *The Hill* (online ed, 12 April 2018).

casts doubt on the likelihood of further large economies accepting bilateral removal of ISDS upon accession.

Because all CPTPP parties must agree to the terms of a new state acceding to the agreement, New Zealand technically has a veto power. However, unlike the failed MAI which was isolated to its subject matter, accepting the ISDS mechanism in the CPTPP entails the ‘carrot’ of significantly increased market access to new economies. New Zealand has more to lose from blocking the accession of a new economy within the trading block, than accepting ever increasing ISDS liability.

V Conclusion

It was a mode of last resort, not a deliberate strategy that led New Zealand to carve the CPTPP Investment Chapter into constituent bilateral arrangements. The approach was only adopted due to the failure to put voluntary ISDS into the text of the CPTPP in the final stages of negotiation. While returning the CPTPP to a quasi-bilateral approach, the process is not directly analogous to negotiating a separate BIT with each state. The ISDS side letters do not seek to adjust the level of investment protection based off New Zealand’s quid-pro-quo arrangements with each member state. Instead New Zealand sought to remove recourse to ISDS with every member state and those were the only five willing. It is perhaps not surprising that only the relatively small economies which, aside from Australia, have very small amounts of FDI in New Zealand agreed to the carve out. Even then, most of these member states already have recourse to ISDS under other treaties.

Potential legal issues aside, treaty-making by side letter is a rather inelegant approach to multilateral agreement. Extensive proliferation of the technique would be negative as it significantly adds to the complexity of deciphering already sprawling and convoluted free trade agreements. From the perspective of individual exporters and investors using the free trade agreement, it is difficult to ascertain the applicable law when the web of side letters are not all contained in one place. It is also surprisingly difficult to track down side letters signed by other countries, some are not made public at all. Including such bilateral

compromises in footnotes or appendices is preferable. When all such arrangements are included within a single treaty there are no abiding questions about whether the other parties consent to the arrangement.

Despite the limited success of New Zealand's 'bilateralism within multilateralism' approach, there have recently been echoes of this in the developments to NAFTA. In October 2018 Canada, Mexico and the United States concluded renegotiations. Similar to the rebranding of the TPP as the CPTPP, NAFTA has been renamed the United States-Mexico-Canada-Agreement (USMCA).²⁰⁰ The new agreement provides a different model for carving up the bilateral relationships in a multilateral investment agreement. The new investment chapter of USMCA includes the standard investment protections but does not include an ISDS mechanism within the main text. The effect of this is that United States investors can no longer bring arbitration claims against Canada and vice versa. An annex to the investment chapter outlines a process for investor state dispute settlement, but only applies between the United States and Mexico.²⁰¹ New Zealand's side letters bilaterally *exclude* ISDS from a multilateral agreement that includes it. United States and Mexico have bilaterally *included* ISDS in a multilateral agreement that otherwise does not provide for it. The other key difference is that the bilateral agreement is contained within the four corners of the multilaterally agreed upon text.

Bilaterally removing the enforcement mechanism of investment protections undoubtedly undermines the overall coherence of a multilateral investment agreement. The reason a multilateral agreement has been pushed for in the first place was the sense that the current web of BITs is inadequate. It would be counterproductive if the current bilateral web was replaced with a new bilateral web simply situated under a multilateral framework. However the purity of multilateral accord must be tempered with the flexibility to allow sovereign states to conclude mutually agreed upon variations. Without this flexibility, the CPTPP

²⁰⁰ Alan Rappeport "Trump Hails Revised NAFTA Deal as a Trade Promise Kept" *The New York Times* (online ed, 1 October 2018).

²⁰¹ United States-Mexico-Canada Agreement, Annex 14-D. Available at <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/>>.

likely would have failed similar to the MAI before it. The ISDS side letters do not prevent effective execution of the object and purpose of the CPTPP as a whole and are therefore valid under the Vienna Convention. The real issue with New Zealand's side letters are not their *legal* effectiveness, but their *practical* effectiveness.

Ultimately, the main contribution of New Zealand's ISDS side letters may be their symbolic value. In the context of an international debate about the future direction of investor-state arbitration, the side letters stake out New Zealand's position on the world stage in unambiguous terms.

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